

This Opinion is Not a
Precedent of the TTAB

Mailed: March 14, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Liquid Web LLC

Serial No. 88910823

Patrick Mastrogiacomo, Jr. of Mastrogiacomo PLLC,
for Liquid Web LLC.

Crystal H. Yi, Trademark Examining Attorney, Law Office 123,
Susan Hayash, Managing Attorney.

Before Goodman, Lynch, and Johnson,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Evidentiary Matter

Liquid Web LLC (“Applicant”) seeks registration on the Principal Register of the mark SAFE HARBOR in standard characters for:

Computer services, namely, the testing and evaluating of online stores to the order and specification of others; computer security consultancy services, namely, providing updated security patches in the nature of updating

computer software, nightly online scanning and detecting of malware on computers and electronic devices and presenting reports concerning the performance of online systems; maintenance of computer software relating to computer security and prevention of computer risks, namely, detecting and blocking malicious cybersecurity attacks via web application firewall; creating staging websites in a controlled cloud environment to conduct regular testing, namely, providing a website that features technology that enables testing of cybersecurity measures and conducting of simulated cyber threat exercises in a controlled cloud environment; maintenance of computer software relating to computer security and prevention of computer risks in order to protect online stores from external cyber-attacks and identify the origin of cyber-attacks; computer security consultancy services, namely, scanning for required patches in the nature of updating and maintenance of computer software, in International Class 42.¹

The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark SAFEHARBOR in standard characters for

Engineering, computer technology and cybersecurity consulting services for maritime organizations, namely, services for updating computer hardware and software relating to computer security and services for prevention of computer security risks; Providing temporary use of non-downloadable cloud-based software to improve computer security and prevent computer security risks for maritime organizations in International Class 42.²

After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed. The Examining Attorney denied reconsideration, and

¹ Application Serial No. 88910823 was filed May 11, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

² Registration No. 5437774 issued April 3, 2018.

the appeal proceeded. Applicant and the Examining Attorney filed briefs. As explained below, we affirm the refusal to register.

Before turning to the merits, we sustain the objection to evidence attached to Applicant's Brief that was not submitted during prosecution of the application, prior to the appeal. As required by Trademark Rule 2.142(d), the record must be complete before an appeal is filed. 37 C.F.R. § 2.142(d). We therefore cannot consider Applicant's new evidence, which should have been submitted during prosecution. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE §§ 1203.02(e), 1207.01 (2021); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.01(c) (2021). “[T]o the extent that any of the evidence attached to the appeal brief was not previously submitted, it is not timely and we give it no consideration.” *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014).

As to the remaining exhibits to Applicant's Brief, Applicant may be “under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither.” *Id.* Attachments of material already in the record “requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application, requiring more time and effort than would have been necessary if citations directly to the prosecution history were provided.” *Id.* at 1951.

II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Communs. Inc.*, 955 F.3d 994, 2020 USPQ2d 10341 *3 (Fed. Cir. 2020). Two key considerations are the similarities between the marks and the relatedness of the services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Strength of the Cited Mark

We first consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by “[t]he number and nature of similar marks in use on similar ... goods [and services].” *DuPont*, 177 USPQ at 567. “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace [or commercial] strength.” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d

1681, 1686 (Fed. Cir. 2010). For likelihood of confusion purposes, a mark's strength "varies along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

Applicant contends that the cited mark is entitled to a narrow scope of protection because it allegedly exists in a crowded field and is conceptually weak. As an initial matter, to the extent Applicant relies on lists of registrations in its Brief that are not part of the record, they receive no consideration. Mere listings of registrations are not sufficient to make the registrations of record. *See In re Jonathan Drew, Inc.*, 97 USPQ2d 1640, 1644 n. 11 (TTAB 2011); *In re Carolina Apparel*, 48 USPQ2d 1542, 1543n.2 (TTAB 1998).

Applicant's arguments regarding commercial weakness or "a crowded field" are unavailing. Applicant has offered no evidence of third-party actual use of SAFE HARBOR marks, and the third-party registrations, with no accompanying evidence of the extent of the use of the marks in commerce, do not diminish the commercial strength of Registrant's mark. "Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693,

694-95 (CCPA 1976)). “We have frequently said that little weight is to be given such [third-party] registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them.” *In re Embiid*, 2021 USPQ2d 577, at *34 (TTAB 2021) (citation omitted).

As to conceptual weakness, Applicant points only to the third-party registrations. However, none of them cover goods or services that on their face are the same as or similar to Applicant’s or Registrant’s services, nor has Applicant demonstrated that the goods or services are related to those at issue. Third-party registrations that identify unrelated goods and services are not persuasive to show weakness of the cited mark. *Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”). For example, Applicant points to a registration for SAFE HARBOR that includes manufacturing “equipment for bulk materials loading, personnel safety access and fall protection,” in Class 40 and “engineering, and technical consulting services in the field of the manufacture of bulk loading

equipment, safety access equipment, fall protection equipment, and industrial steel structures.”³ Such evidence does not bear on the strength of the cited mark.

Applicant also characterizes its weakness argument differently, claiming that evidence of marks that consist of or include the term SAFE HARBOR that “coexist in Classes 035 and 036” or other classes “demonstrate[e] that Applicant’s mark and the cited registration can coexist in another class.”⁴ We find it unconvincing for the same reasons set forth above. Also, as we discuss further below, each case must be decided on its own facts.

We therefore find that the cited registration should be accorded the ordinary scope of protection in the likelihood of confusion analysis.

B. Similarity of the Marks

We turn to comparing Applicant’s and Registrant’s marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. App’x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach*

³ 6 TTABVUE 9 (Applicant’s Brief).

⁴ 6 TTABVUE 15 (Applicant’s Brief).

Servs. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

We compare Applicant's mark, SAFE HARBOR, to the cited mark, SAFEHARBOR, and find them nearly identical in appearance, and identical in sound and commercial impression. Contary to Applicant's arguments, the presence or absence of a space between the words SAFE and HARBOR in the respective marks is insignificant and does not distinguish them. *See In re Planalytics Inc.*, 70 USPQ2d 1453 (TTAB 2004) (the absence of the space in GASBUYER does not create a different meaning or perception of the term); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD "are, in contemplation of law, identical"); *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"). We disagree that the inclusion of a space makes the marks sound different on the premise that "the space indicates a pause."⁵ Applicant makes no argument that the identical terms have a different meaning or impression in the respective marks.

As noted in Applicant's Brief, "To the extent that both Applicant's mark and the registered mark '774 share the terms "SAFE" and "HABOR", Applicant acknowledges

⁵ 6 TTABVUE 6.

that the marks are similar.”⁶ Given their overall resemblance in appearance, and their identical sound, connotation and commercial impression, we find Applicant’s mark and the cited mark highly similar.

Thus, the first *DuPont* factor weighs heavily in favor of a likelihood of confusion.

C. The Services

The second *DuPont* factor addresses the relatedness of the services. Under the second factor, “likelihood of confusion can be found ‘if the respective goods [or services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). In analyzing the relatedness of the services at issue, we look to the identifications in the application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any service encompassed by the identification in this single-class application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 123 USPQ2d 1744.

⁶ 6 TTABVUE 5.

While the Examining Attorney and Applicant argue over whether the services are related, we actually find that some of Applicant's services are broad enough to encompass certain services in the cited registration. Applicant's services include "computer security consultancy services, namely, providing updated security patches in the nature of updating computer software, nightly online scanning and detecting of malware on computers and electronic devices and presenting reports concerning the performance of online systems; maintenance of computer software relating to computer security and prevention of computer risks, namely, detecting and blocking malicious cybersecurity attacks via web application firewall." Applicant and the Examining Attorney discuss other services recited by Applicant that focus on online stores in particular. However, the services we quote here are separated from the more specifically focused portion of the recitation by a semi-colon, and thus are separate services that are not so limited. *See* TMEP § 1402.01(a) ("Semicolons should generally be used to separate distinct categories of goods or services within a single class."). In an analogous situation in *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013), the Board explained:

In the cited registration's identification of services, the "providing banquet and social function facilities for special occasions" are services separated by a semicolon from the "restaurant and bar services." Under standard examination practice, a semicolon is used to separate distinct categories of goods or services. We find that here, the semicolon separates the registrant's "restaurant and bar services" into a discrete category of services which is not connected to nor dependent on the "providing banquet and social function facilities for special occasions" services set out on the other side of the semicolon. We further find that the registrant's "restaurant and bar services," as

separately set out in the identification of services by means of the semicolon, stand alone and independently as a basis for our likelihood of confusion findings under the second and third *du Pont* factors.

Considering these separate, unrestricted services, we must presume that they encompass all types of such services and all activities included in the identified services. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (where a description of goods includes no restrictions or limitations, the Board must read the application to cover all goods of the type identified); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the services in an application or registration are broadly described, they are deemed to encompass all the activities of the nature and type described therein).

Turning to the cited registration, it identifies “cybersecurity consulting services for maritime organizations, namely, services for updating computer hardware and software relating to computer security and services for prevention of computer security risks; Providing temporary use of non-downloadable cloud-based software to improve computer security and prevent computer security risks for maritime organizations.” While Registrant’s recitation restricts its services as being “for maritime organizations,” Applicant’s broad and unrestricted recitation of services must be read to include those for any type of entity, including maritime organizations.

For example, Applicant’s service of updating computer software to scan for and detect malware on computers and electronic devices and present reports concerning the performance of online systems could be used by maritime organizations. In that

scenario, Applicant's service overlaps with Registrant's cybersecurity consulting services for maritime organizations that involve updating computer software relating to computer security and services for the prevention of computer security risks. Similarly, Applicant's service of detecting and blocking malicious cybersecurity attacks via web application firewall could be performed for maritime organizations. In that setting, the web-based firewall can be the same as "non-downloadable cloud-based software to improve computer security and prevent computer security risks for maritime organizations," as identified in the cited registration. Registrant's services therefore would fall within the scope of the subject application.

We therefore find that on the face of the identifications, the services overlap in part, obviating the need for evidence of relatedness. Nonetheless, the Examining Attorney submitted some. For example:

DNV-GL's website indicates that it "help[s] companies in a wide range of industries," and that their "Services across industry sectors" include "Cyber Security services." The website also includes an article by DNVGL's Cyber Security Team Leader titled "Maritime cyber security services and solutions."⁷

The Nettitude website advertises under that mark "Cybersecurity Services" for a wide variety of industries, specifically including "Cybersecurity For Marine & Offshore" and "Cybersecurity for Retail."⁸

The Cybeta website promotes under the CYBETA mark its "Pre-emptive Cyber Threat Protection for the Maritime

⁷ TSDR August 6, 2020 Office Action at 8-11 (dnvgl.com).

⁸ TSDR August 6, 2020 Office Action at 12 (nettitude.com).

Industry” as well as its work “helping retailers stay safe” from cyberattacks.⁹

The DarkTrace website points to its work in the “Retail & e-commerce” sector, which it asserts is “one of the top cyber-attack targets among all industries,” and its work in the “Transportation” field, including helping “a leading service provider in the maritime industry” “stay one step ahead of today’s most sophisticated cyber-attacker.”¹⁰

The Expleo website promotes under that mark its cybersecurity services that reduce risk and provide “[s]upport at all stages of the product and software lifecycle,” and promotes its broader services under the mark for the “Retail and Logistics” industry as well as the “Naval” industry.¹¹

The Fujitsu website touts its “Enterprise and Cyber Security Services” and under the same mark promotes its “Digital Solutions for the Maritime Industry” and its “Fujitsu Retail Digital Solutions.”¹²

The NCCGroup website promotes its Cyber Security services that include “software resilience services, along with functional testing,” for the “Transport and Manufacturing” sector, explicitly including “maritime” industries, and for the “Retail” sector, explicitly including ecommerce.¹³

Thus, even considering the specialized focus on online stores in *some* of Applicant’s services, this third-party evidence supports the relatedness of the services in the application and the cited registration by showing that consumers are accustomed to encountering them offered under the same mark. *See Detroit Athletic Co.*, 128

⁹ TSDR February 17, 2021 Office Action at 15-16 (cybeta.com).

¹⁰ TSDR February 17, 2021 Office Action at 17-18 (darktrace.com).

¹¹ TSDR February 17, 2021 Office Action at 25-27 (expleogroup.com).

¹² TSDR February 17, 2021 Office Action at 28-30 (fujitsu.com).

¹³ TSDR February 17, 2021 Office Action at 36-37 (nccgroup.com).

USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Applicant criticizes much of this evidence by alleging that “[a]lthough these organizations offer similar services across a wide range of industries, they do not, however, offer these services for online web-based stores.”¹⁴ However, as discussed above, the evidence on its face indicates its applicability to the online retail field. Thus, we do not agree with Applicant’s characterization.

Applicant also proposes that this evidence is unpersuasive because the same type of evidence would have supported refusal of other marks that consist of or include SAFE HARBOR for other services, such as banking, insurance, or real estate services. The prior decisions and actions of other trademark examining attorneys in registering other marks based on different records have little evidentiary value and are not binding upon the USPTO or the Board. TMEP § 1207.01(d)(vi); *see In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case is decided on its own facts, and each mark stands on its own merits. *USA Warriors*, 122 USPQ2d at 1793 n.10.

¹⁴ 6 TTABVUE 18 (Applicant’s Brief).

In addition, the Examining Attorney introduced numerous use-based, third-party registrations showing that the same entity has registered a single mark identifying a wide variety of cybersecurity-related services.¹⁵ Such registrations are relevant to show that diverse cybersecurity services may emanate from a single source under one mark. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1140 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988).

Applicant complains that the record “is not conclusive that the Registrant will offer computer consulting services to other industries outside of the maritime industry.”¹⁶ However, Applicant has broadly identified some of its cybersecurity services, which could extend to the maritime industry that is the focus of the cited registration’s services. Regardless, Applicant misapprehends the proper inquiry under this *DuPont* factor, because services need not be identical or even competitive to support likely confusion. *Coach Servs.*, 101 USPQ2d at 1722. Instead, we assess whether consumers would believe that the goods at issue could emanate from the same source. Even apart from the overlapping services in this case, the record shows that consumers encounter some of Applicant’s and Registrant’s other services under the same mark, and therefore we find them related. *See Primrose Retirement Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016)

¹⁵ TSDR July 20, 2020 Office Action at 5-48; December 10, 2020 Office Action at 3-93.

¹⁶ 6 TTABVUE 18 (Applicant’s Brief).

(citing *Tuxedo Monopoly*, 209 USPQ at 988) (“Likelihood of confusion must be found as to the entire class of services ... if there is likely to be confusion with respect to any service that comes within the recitation of services in that class.”)

We are not persuaded by Applicant’s arguments that its mark should be registered because other pairs of third-party registrations coexist in the same classes and contain some of the same terms. First, much of the underlying registration evidence is not in the record.¹⁷ Second, even if it were considered, this type of evidence regarding marks for other goods and services is not particularly relevant. As noted above, each case is decided on its own facts, and each mark stands on its own merits. *USA Warriors*, 122 USPQ2d at 1793 n.10. Third, we agree with the Examining Attorney that the pairs of registrations are not analogous to the scenario here, and unlike Applicant’s and Registrant’s services, the third-party registrations concern goods and services that are not necessarily related on their face. Thus, their coexistence is unsurprising. Finally, registration evidence such as this necessarily is one-sided, in that it does not reflect refusals of registration that may have been made in comparable scenarios, so we do not rely on it to infer an examination practice or policy that impacts the application at issue.

¹⁷ Applicant’s request for reconsideration includes some printouts from the USPTO’s TESS database, but in almost all cases the first page of each record is missing, and therefore the mark is not included. TSDR August 16, 2021 Request for Reconsideration at 2-86. While Applicant attached complete copies to its Brief, as noted above, the record must be complete prior to appeal, and new evidence has not been considered.

Because Applicant's and Registrant's services overlap, they are legally identical in part, and the record further shows their relatedness. This factor weighs heavily in favor of likely confusion.

D. Trade Channels and Classes of Consumers

The third *DuPont* factor addresses the trade channels in which the good travel, and the classes of consumers of such services. Where, as here, the services overlap and are legally identical, we therefore presume that they travel through at least some of the same channels of trade to the same classes of purchasers, considerations under the third *DuPont* factor. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *see also American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, "the marketing channels of trade and targeted classes of consumers and donors are the same"); *L. & J.G. Sticklely, Inc. v. Cosser*, 81 USPQ2d 1956, 1971 (TTAB 2007) ("Because the goods of both parties are at least overlapping, we must presume that the purchasers and channels of trade would at least overlap."). The Internet evidence discussed above corroborates this presumption.

Applicant contends that its "computer services for online stores and the cited Registrant's engineering, computer technology and cybersecurity consulting services

for maritime organizations are distributed through different markets.”¹⁸ As discussed above, not all of Applicant’s services are limited to “online stores,” and some are broad enough to encompass Registrant’s services in the maritime trade channels. To the extent Applicant asks that we narrow the trade channels based on its assertions about the actual marketplace, we cannot do so. We must rely on the identification of services. *Octocom Sys.*, 16 USPQ2d at 1787; *see also In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013) (“An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence”) (quoting *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008)). In addition, as noted, even some of Applicant’s and Registrant’s non-overlapping services move in some of the same trade channels, as reflected in the third-party Internet evidence described above.

The services travel in overlapping trade channels to some of the same classes of consumers. Thus, the third *DuPont* factor weighs heavily in favor of likely confusion.

E. Conditions Under Which and Buyers to Whom Sales Are Made

The fourth *DuPont* factor involves “[t]he conditions under which and buyers to whom sales are made, i.e., impulse vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant points to some evidence that the maritime industry as a whole is large and has a significant economic impact, and that the industry is subject to substantial regulation.¹⁹ Applicant’s evidence and arguments do not relate directly

¹⁸ 6 TTABVUE 20 (Applicant’s Brief).

¹⁹ 6 TTABVUE 21 (Applicant’s Brief).

to the degree of care in purchasing the types of cybersecurity services for “maritime organizations” recited by Registrant. We note that such organizations could include small, less sophisticated maritime organizations. “Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’” *See Stone Lion Capital Partners*, 110 USPQ2d at 1163.

Some of Applicant’s services are broadly identified cybersecurity services that are not restricted to particular types of purchasers, and we find that the potential consumers could include ordinary members of the general public.

Without supporting evidence that proves the relative sophistication of purchasers or elevated degree of care, *see Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)), we find this factor neutral.

F. Alleged Absence of Actual Confusion

Under the seventh and eighth *DuPont* factors, the record lacks evidence regarding the absence of actual confusion, or any contextual evidence “such that we could make a finding as to the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, *25 (TTAB 2020). Although Applicant makes assertions in its Brief based on its alleged date of first use in 2020, again, “[a]ttorney argument is no substitute for evidence.” *Cai v. Diamond Hong*, 127 USPQ2d at 1799. We also note that “in this ex parte context, there has been no opportunity to hear from Registrant

about whether it is aware of any reported instances of confusion.” *Guild Mortg.*, 2020 USPQ2d 10279 at *23. We find these factors neutral.

III. Conclusion: Balancing the *DuPont* Factors

The near identity of the marks for overlapping and related services that move in some of the same channels of trade to the same classes of customers renders confusion likely.

Decision: The refusal to register Applicant’s mark is affirmed.